84-1767

No.....

Office-Supreme Court, U.S.
FILED
MAY 8 1985
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In The
Supreme Court of the United States
October Term, 1984

IN THE MATTER OF THE MARRIAGE OF
JOSEPH J. KONZEN,

Petitioner,

and

GERALDINE H. KONZEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the
Supreme Court of the State of Washington

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QUESTIONS PRESENTED FOR REVIEW

The petitioner retired from the United States Navy in 1967 after twenty-five years of service. Subsequently, in 1970, the petitioner married the respondent and this dissolution proceeding results from that marriage.

ISSUE NO. I

Do the provisions of the Uniformed Services Former Spouses' Protection Act (USFSPA) contained in 10 U.S.C. §1408 authorize a state court, in a dissolution of marriage proceeding, to award a portion of a service member's military retirement pay to the member's spouse when the marriage of the parties was subsequent to the member's retirement from the military service?

ISSUE NO. II

If the USFSPA does not authorize such an award by a state court, are state courts prohibited from exercising jurisdiction over and awarding a portion of a service member's military retirement pay to the member's spouse when the marriage of the parties was subsequent to the member's retirement from the military service?

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No.....

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OPINIONS BELOW

The unpublished opinion of the Court of Appeals of the State of Washington, Division Two, [Docket No. 5096-0-II] filed on February 29, 1984, is reproduced verbatim in the Appendix, pages A-1 through A-5. The opinion of the Supreme Court of the State of Washington

[Docket No. 50402-4] filed on January 11, 1985, and reported at 103 Wn. 2d 470, 693 P. 2d 97 (1985), is reproduced verbatim in the Appendix, pages A-1 through A-18.

GROUNDS FOR JURISDICTION

The Supreme Court of Washington filed its decision in this case on January 11, 1985. On February 15, 1985, the Supreme Court of Washington entered an Order Denying Motion For Reconsideration denying the respondent's motion for reconsideration. A copy of that order is included in the Appendix at page C-1.

This court has jurisdiction to review the decision of the Washington Supreme Court. This jurisdiction is conferred by 28 U.S.C. § 1257.

STATUTE INVOLVED

Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, § 1002, 96 Stat. 730 (1982) (codified in 10 U.S.C. § 1408) (Reproduced verbatim in the Appendix, pages A-1 through A-10.)

STATEMENT OF THE CASE

This is a dissolution of a second marriage for both parties. The petitioner's prior marriage was dissolved in 1969. The parties were married June 22, 1970, and were

separated August 1, 1979. No children were born of the marriage of the parties and neither party had any dependents.

The petitioner entered the United States Navy in 1942 during World War II. He retired in June, 1967, prior to his marriage to the respondent. It was agreed between the parties and found by the court that the military pension of the petitioner was his separate property. Despite the trial court's finding that the petitioner's military pension was his separate property, the trial court awarded thirty (30) percent of the petitioner's military retirement pay to the respondent as an "award of property but in the nature of permanent, non-modifiable alimony" and directed that the petitioner pay thirty (30) percent of his monthly payment to the respondent.

While this case was pending appeal in the Court of Appeals for the State of Washington, this Court decided *McCarty v. McCarty*, 453 U.S. 210, 69 L. Ed. 2d 589, 101 S. Ct. 2728 (1981), and Congress enacted the Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, § 1001, et seq., 96 Stat. 730 (1982). The petitioner, through his brief submitted to the Court of Appeals, presented for the court's consideration the question of the application to this case of the *McCarty* decision and the preemption doctrine as it applies to military retirement pay. Through her Supplemental Brief submitted to the Court of Appeals, the respondent brought before the court for the first time the issue of the application of the Uniformed Services Former Spouses' Protection Act. In its unpublished opinion, the Court of Appeals held that the USFSPA nullified the *McCarty* decision and that the USFSPA permitted state courts to consider and divide

military retirement pay in accordance with state law even in those circumstances where the marriage occurred subsequent to the retirement of the service member. [See, Appendix, pages A-2 through A-4.]

In his petition for review to the Washington Supreme Court, the petitioner again challenged the state trial court's exercise of jurisdiction over the petitioner's separate military retirement pay. In rendering their decision, the majority of the Washington Supreme Court held that the USFSPA eliminated all effects of the *McCarty* decision and allowed state courts to exercise jurisdiction over military retirement pay even where the marriage of the parties occurred subsequent to the retirement of the service member. *Marriage of Konzen*, 103 Wn. 2d 470, 473-7, 693 P. 2d 97, 99-101 (1985). However, in his dissent, Justice Brachtenbach argued that the majority was only able to arrive at and sustain its decision by the improper use of rules of statutory construction. The statute was plain and free from ambiguity, thus, the use of rules of statutory construction was both unnecessary and improper. Justice Brachtenbach concluded that the 10-year requirement of 10 U.S.C. § 1408(d) (2) applied to the entire Act and, thus, the case should be reversed and remanded. *Id.*, at 478-83, 101-104.

ARGUMENT

I.

The provisions of the Uniformed Services Former Spouses' Protection Act as contained in 10 U.S.C. § 1408 do not authorize a state court to award a portion of a service member's military retirement pay to the member's spouse when the marriage of the parties occurred subsequent to the member's retirement from the military service.

The Uniformed Services Former Spouses' Protection Act (USFSPA), grants authority to state courts to consider and award a portion of a service member's military retirement pay to the member's spouse. However, this grant of authority is specifically limited by the statute itself. This grant of authority is found in paragraph 1408(c)(1) of the Act. Paragraph 1408(c)(1) begins with the specific language that this grant of authority is "[s]ubject to the limitations of this section. . . ." Paragraph 1408(d)(2) contains a specific limitation on the application of the Act as a whole including the grant of authority to state courts. Paragraph 1408(d)(2) provides that:

> If the spouse or former spouse to whom payments are to be made *under this section* was not married to the member for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retired or retainer pay, *payments may not be made under this section* to the extent that they include an amount *resulting from the treatment by the court under subsection (c)* of disposable re-

> tired or retainer pay of the member as property of the member or property of the member and his spouse. (Emphasis added.)

Paragraph 1408 (d)(2) limits the grant of authority contained in this Act to instances where the parties have been married for a period of ten (10) years or more during which the service member performed at least ten (10) years of service for which the member is entitled to receive retirement pay. This paragraph specifically states that "payments may not be made under this section" if the marriage of the parties has not satisfied these two 10-year requirements.

The majority of the Washington Supreme Court concluded that the two ten-year requirements found in paragraph 1408(d)(2) were simply a limitation as to whether payments could be made by the respective service finance centers as opposed to being a limitation that applies to the Act in its entirety. However, that interpretation of the term "payment" is inconsistent with the language of the statute as a whole. All of § 1408 is entitled "Payment of retired or retainer pay in compliance with court orders". Since the title to this section uses the term "payment" as opposed to "rights in or to" retired or retainer pay, for instance, the term "payment" as used in the statute clearly would indicate it applies to whether any payments of retired pay should be made to the spouse, regardless of whether paid directly by the service member or by the respective service finance center. Thus, the term "payment" applies to the act as a whole and not just in the restrictive sense that it applies to payments to be made by the service finance center. Consequently, paragraph 1408(d)(2) prohibits any payment to the spouse

whether made by the service member directly or the service finance center if the marriage of the parties has not satisfied the two ten-year requirements.

The provision of 1408(d)(2) that "payments may not be made under this *section*" (emphasis added) is a limitation that applies to the entire Act. This is by virtue of the language "under this *section.*" As Justice Brachtenbach of the Washington Supreme Court concluded in his dissenting opinion, "[a]n examination of the statute itself is conclusive proof that the word 'section' encompasses every part of Section 1408(a) through (h)." *Marriage of Konzen,* 103 Wn. 2d 470, 480, 693 P.2d 97, 102 (1985). As Justice Brachtenbach noted in his dissent the introductory language contained in § 1002 of Public Law 97-252 which amended the United States Code by adding § 1408 referred to § 1408(a) through (h) as "the following new section. . . ." Pub. L. No. 97-252, 96 Stat. 730 (1982). As further evidence that the term "section" applies to the entirety of § 1408(a) through (h) is the fact that throughout the statute the terms "subsection", "paragraph" and "subparagraph" are utilized to refer to specific provisions of the statute. Thus the specific limitations contained in paragraph 1408(d)(2) are the limitations referred to in paragraph 1408(c)(1) that limit the grant of authority contained in the Act.

Both the Washington State Court of Appeals and the Washington Supreme Court erred in looking beyond the statute in arriving at their decisions. The language of this statute is plain and free from ambiguity. When the language of a statute is plain and free from ambiguity, the rules of statutory construction established by both

this Court and the Washington courts require that the duty of the court is to enforce the statute in accordance with its terms and not seek some interpretation based upon external consideration. *Caminetti v. United States,* 242 U.S. 470, 485, — L.Ed. —, —, 37 S.Ct. 192, 194 (1916); *People's Org. for Wash. Energy Resources v. Utilities and Transp. Comm'n,* 101 Wn. 2d 425, 429-30, 679 P.2d 922, —, (1984). In *Caminetti,* this Court held that where the language is plain and does not result in an absurd or wholly impracticable consequence, the language of the statute is the sole evidence of the ultimate legislative intent. *Caminetti,* at 490. Here, the language of § 1408 does not result in an absurd or wholly impracticable consequence. A literal reading of the statute provides for protection to the spouses of members of the armed services in situations where the spouse has been married to the service member for a substantial period of the member's active service in the military.

Since the parties in this matter were not married until the petitioner's retirement from the Navy, the requirements of paragraph 1408(d)(2) are not satisfied and the grant of authority contained in paragraph 1408 (c)(1) does not apply. Thus, in this case, the USFSPA did not authorize the trial court to award a portion of the petitioner's retirement pay to the respondent.

II.

If the USFSPA does not authorize a state court to award a portion of a service member's military retirement pay to the member's spouse when the marriage of the parties occurred subsequent to the member's retirement from the military service, a state court is prohibited by this Court's decision in McCarty v. McCarty, 453 U.S. 210 (1981) from awarding a portion of the member's military retirement pay to the member's spouse.

If the USFSPA does not authorize a state court to consider and award a portion of a service member's military retirement pay to the member's spouse where the parties' marriage occurred subsequent to the retirement of the member, state courts are precluded by the preemption doctrine from exercising jurisdiction over the service member's military retirement pay. This Court has repeatedly held that state laws may not interfere with federal legislation designed to carry out a national purpose. *Sperry v. State of Fla. ex rel. Florida Bar,* 373 U.S. 379, 384, 10 L. Ed. 2d 428, —, 83 S. Ct. 1322, 1325 (1963); *James Stewart & Co. v. Sadrakula,* 309 U.S. 94, 103-4, 84 L. Ed. 596, —, 60 S. Ct. 431, 436 (1940).

This Court in the *McCarty* decision recognized that military retirement pay is a personal entitlement of the retiree. *McCarty v. McCarty,* 453 U.S. 210, 232, 69 L. Ed. 2d 589, —, 101 S. Ct. 2728, 2741 (1981). In *McCarty,* this Court found that the military retirement pay system serves a vital national goal and that the states may not interfere with that goal without a specific congressional

grant of authority. *Id.* at 234-6. Thus, state courts are precluded from exercising jurisdiction over military retirement pay except under the limited circumstances where the marriage of the parties satisfies the requirements of paragraph 1408(d)(2). This is because the state courts are without any specific grant of authority from Congress to deal with the subject, i.e., military retirement pay, for which Congress has created an extensive legislative scheme to promote a vital national interest. In fact, with the enactment of the USFSPA, Congress has reinforced its intent to legislate in this area and has added even further provisions to this already extensive legislative scheme. Consequently, in this case, the Washington trial court had no authority to award to the respondent a portion of the petitioner's military retirement pay.

Therefore, in instances where the marriage of the parties occurred subsequent to the service member's retirement from the military service, the USFSPA does not authorize a state court to award to the member's spouse a portion of the service member's military retirement pay. Under those factual circumstances where the USFSPA does not apply, the holding of the *McCarty* decision remains in full force and effect and precludes state courts from exercising jurisdiction over military retirement pay.

CONCLUSION

The Washington Supreme Court erred in its decision and by so doing impinged on the rights, privileges and/or entitlement of the petitioner as provided for in the laws of the United States and that the exercise of jurisdiction over the military retirement pay of the petitioner by the Washington courts is unconstitutional. For these reasons, this Court should grant a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

NO. 5096-0-II

DIVISION TWO

IN RE THE MARRIAGE OF JOSEPH J. KONZEN,

Petitioner,

and

GERALDINE H. KONZEN,

Respondent.

UNPUBLISHED OPINION

(Filed: February 29, 1984)

PETRICH, C.J.—Joseph J. Konzen appeals from a decree of dissolution of his marriage to Geraldine H. Konzen. He contends the trial court erred in awarding to Geraldine a portion of his military retirement pay, as well as attorney's fees. We affirm the decree as modified.

The decree, entered September 1980, terminated a marriage of 10 years' duration. The net community estate, consisting primarily of the family home and a contract vendor's interest in the sale of a restaurant business valued at about $130,000, was divided more or less evenly. The husband's military retirement accrued from 25 years of naval service ending prior to his marriage to Geraldine, was classified as his separate property and valued at $167,870. The court awarded 30 percent of the husband's military retirement pay as an "award of prop-

erty but in the nature of permanent, nonmodifiable alimony'' and directed that the husband pay 30 percent of the monthly payment to the wife.

The decree further provided that the award would continue beyond the wife's death as part of her estate and would cease only upon the death of the husband. The court awarded the wife $5,000 in attorney's fees offset by a contempt award in favor of the husband of $750.

The wife did not complete her high school education and her work experience included that of a waitress, bartender and restaurant manager. The husband obtained two college degrees and held responsible positions during his 25-year naval career. Although both parties suffer physical disabilities, their disabilities are not of such a nature as to preclude gainful enployment. The husband has a greater earning capacity than the wife. At the time of trial the husband was employed as a manager of a local golf club and the wife was unemployed.

Since the trial and pending this appeal, there has been a considerable change in the law relating to the authority of state courts to apportion military retirement benefits. The United States Supreme Court in *McCarty v. McCarty,* 453 U.S. 210, 69 L. Ed. 2d 589, 101 S. Ct. 2728 (1981), held that under the supremacy clause the state courts were without authority to award any part of a spouse's military retirement to the other spouse. Our Supreme Court interpreted *McCarty* to prohibit a state court from valuing the benefits and offsetting other property against that value. *In re Marriage of Dessauer,* 97 Wn. 2d 831, 650 P. 2d 1099 (1982). *McCarty* was nullified by the "Uniformed Services Former Spouses' Protection

Act," 10 U.S.C.A. § 1408 (1983) (Pub. Law 97-252), which permits with certain exceptions the treatment of military retirement rights in accordance with the law of the respective states. Under the Act, disposable retirement benefits may be awarded to the non-military spouse. Then in *In re Marriage of Smith,* 100 Wn. 2d 319, 669 P. 2d 448 (1983), our Supreme Court removed any doubt that may have been implied in *Dessauer* and clearly established that under the law of this state military retirement benefits are subject to division in a dissolution action.

Where there has been a change of law during the pendency of an appeal, the new law applies. *Sparkman & McLean Co. v. Govan Investment Trust,* 78 Wn. 2d 584, 478 P. 2d 232 (1970).

The Act specifically permits the state court to treat "disposable retired or retainer pay" as property of the retiree or property of the retiree and his spouse in accordance with the law of the state. 10 U.S.C.A. § 1408 c(1) (1983). Disposable retired or retainer pay means the total monthly benefits (but not including disability benefits) less certain deductions set forth in 10 U.S.C.A. § 1408 a(4) (1983). State law permits a division of such military retirement benefits. *In re Marriage of Smith, supra.* The fact that the retirement benefits are classified as separate property does not deprive the court of its authority to apportion benefits to the wife. Separate property is subject to being awarded to the other spouse in a dissolution proceeding. *Moore v. Moore,* 9 Wn. App. 951, 515 P. 2d 1309 (1973); *see* RCW 26.09.080.

The husband contends that the Act precludes the court from treating his retirement benefits as subject to

apportionment to his former wife because he was not married to his former wife for 10 years or more during which he performed a minimum of 10 years of military service creditable toward retirement benefits, citing 10 U.S.C.A. § 1408 d(2) (1983). The husband misreads the section. That section simply precludes direct payments by the service finance centers to the spouse and does not prohibit the court from treating such benefits as property.[1]

Nevertheless the trial court was without authority to extend benefits beyond the death of the wife and payable to her estate. The Act specifically precludes the assignment, transfer or disposition including disposition by inheritance by the former spouse. 10 U.S.C.A. § 1408 c(2) (1983). To this extent the decree must be modified.

---

[1]The conferees report, H.R. No. 97-749, 97th Cong., 2nd Sess. 166, 167, *reprinted in* [1982] U.S. Code Cong. & Ad. News 1569, 1572 is informative on the point:

"The conferees agreed to remove the restriction that would require 10 years of marriage before military retired pay could be considered property by the courts. The conferees further agreed, however, that direct payments by the service finance centers to a former spouse from the member's retired pay based on a division of that retired pay as property would be limited to situations in which the former spouse was married to the member for at least 10 years while the member performed military service. The 10-year restriction would not apply to direct payments based on the award of child support or alimony.

"Currently, there is no Federal enforcement mechanism for court-ordered property division of military retired pay available to former spouses of military personnel. The conferees agreed to a Federal enforcement provision as described above; however, jurisdiction of the courts to consider military retired pay when fixing the property rights between the parties to a divorce, dissolution, legal separation or annulment would not be affected by the 10-year marriage requirement."

We next address the husband's challenge to the trial court's award of attorney's fees. The awarding of attorney's fees is a matter within the sound discretion of the court and will not be reversed unless untenable or manifestly unreasonable. *Mayo v. Mayo,* 75 Wn. 2d 36, 448 P. 2d 926 (1968); *Valley v. Selfridge,* 30 Wn. App. 908, 639 P. 2d 225 (1982). At the time of trial the court found that the wife had no income apart from temporary maintenance, while the husband had a substantial income. Although the wife was awarded some property in the dissolution she was in much greater need than the husband. There was no abuse of discretion.

On appeal the wife seeks additional attorney's fees for the prosecution of this appeal. We determine that attorney's fees for this appeal in the amount of $2,500 is reasonable. Judgment is modified to include an additional sum of $2,500 to the wife as attorney's fees to prosecute this appeal.

The trial court's decree is further modified to award to the wife 30 percent of the husband's military retirement, meaning 30 percent of the husband's "disposable retired or retainer pay" as defined in the Act, so long as the wife shall live.

The trial court's judgment is affirmed as modified.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

/s/ Petrich, C.J.

WE CONCUR:

/s/ Petrie, J.

/s/ Worswick, J.

APPENDIX B

[No. 50402-4.] En Banc.

In the Matter of the Marriage of JOSEPH J. KONZEN, Petitioner, and GERALDINE H. KONZEN, Respondent.

(Filed January 11, 1985)

[1] Divorce and Dissolution—Disposition of Property—Military Pension—Jurisdiction. Under RCW 26.09.080, a trial court in a dissolution action has jurisdiction over military retirement pay which is one of the spouse's separate property.

[2] Statutes—Construction—Legislative Intent—Legislative History. Legislative history may be considered to determine the legislative body's intent in enacting an ambiguous statute.

[3] Divorce and Dissolution—Disposition of Property—Military Pension—Service While Married—Necessity. Section 1408(d)(2) of the Uniformed Services Former Spouses' Protection Act (10 U.S.C. § 1408) does not condition a state court's authority to divide military retirement pay in a dissolution action upon the marriage having existed for more than 10 years during the military person's qualifying service.

[4] Divorce and Dissolution—Disposition of Property—Characterization—Effect. Under RCW 26.09.080, the separate or community character of property, although relevant, is not a determinative factor in making a fair division of marital property.

[5] Divorce and Dissolution—Disposition of Property—Review. A property division in a dissolution action is reviewed only for a manifest abuse of discretion.

Brachtenbach and Dolliver, JJ., dissent by separate opinion; Callow, J., did not participate in the disposition of this case.

Nature of Action: Action to dissolve a marriage which had taken place after one of the spouses had retired from the military.

Superior Court: The Superior Court for Kitsap County, No. 79-3-01227-6, Waldo F. Stone, J., on September 26, 1980, entered a dissolution decree awarding the nonmilitary spouse a percentage of the military retirement pay.

Court of Appeals: In an unpublished opinion noted at 36 Wn. App. 1076, the court *modified* the decree by terminating the nonmilitary spouse's interest in the retirement pay at her death.

Supreme Court: Holding that neither federal law nor the separate character of the military retirement pay prevented the trial court from dividing the pay, the court *affirms* the decision of the Court of Appeals.

Shiers, Kamps, Love & Chrey, by *Wm. J. Kamps,* for petitioner.

Robert M. Sifferman, for respondent.

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 50402-4
En Banc

In re the Marriage of

JOSEPH J. KONZEN,

Petitioner,

v.

GERALDINE H. KONZEN,

Respondent.

(Filed January 11, 1985)

DIMMICK, J.—This appeal challenges the trial court's award of a portion of petitioner's military retired pay to his former spouse where that military retired pay accrued prior to their marriage and was his separate property. We hold that the trial court had the authority to make such an award and did not abuse its discretion in so doing.

Prior to Joseph and Geraldine Konzens' marriage on June 22, 1970, Mr. Konzen had retired from a 25-year career with the United States Navy. This was a second marriage for each party. At the time of trial, he was receiving $1,653 per month in military retired pay. Although both parties were unemployed at the time of trial, the trial court found that Mr. Konzen had a substantially and disproportionately greater earning capacity than Mrs. Konzen. Mr. Konzen holds an undergraduate degree and a masters degree. Until just prior to trial, he had worked as a manager for the Kitsap Golf & Country Club. Mrs.

Konzen has not completed high school. She has worked occasionally as a waitress and a retail clerk. Both parties have health problems. Mr. Konzen suffers from a vascular problem which causes his right leg to bleed after prolonged sitting or standing. Mrs. Konzen is a recovering alcoholic.

A final decree of dissolution was entered on September 26, 1980. The trial court characterized Mr. Konzen's military retired pay as his separate property. The rest of the parties' property was characterized as community property. The trial court apportioned the Konzens' community property approximately equally. In addition, it awarded 30 percent of Mr. Konzen's military retired pay to Mrs. Konzen. The trial court based the property division on the economic circumstances of the parties. In its oral opinion, it stated that it had chosen to award a portion of Mr. Konzen's separate property, rather than a disproportionate share of the community property, to Mrs. Konzen because the military retired pay was a more liquid asset.

Mr. Konzen appealed the award of 30 percent of his military retired pay. The Court of Appeals modified the award to cut off Mrs. Konzen's interest at her death, but otherwise affirmed the property division made by the trial court.

Petitioner herein contends that the trial court lacked subject matter jurisdiction over his military retired pay. We disagree. The trial court acted within its authority when it awarded a portion of the petitioner's military retired pay to his former wife. *Wilder v. Wilder,* 85 Wn. 2d 364, 366-67, 534 P. 2d 1355 (1975). While the Konzens' appeal was pending, the United States Supreme Court held

in *McCarty v. McCarty,* 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981), that state courts could not divide military retired pay as part of a property division in a dissolution. However, nothing in *McCarty* indicates that it was intended to divest the state courts of jurisdiction over military retired pay. *McCarty* merely changed the rule of law to prohibit the division of military retired pay as community or marital property. *In re Marriage of Brown,* 98 Wn. 2d 46, 49, 653 P. 2d 602 (1982); *In re Marriage of Smith,* 98 Wn. 2d 772, 774, 657 P. 2d 1383 (1983). *Accord In re Marriage of De Gryse,* 135 Ariz. 335, 338, 661 P. 2d 185 (1983).

Even under *McCarty,* the trial court would have had jurisdiction over Mr. Konzen's military retired pay as his separate property. RCW 26.09.080. In fact, the United States Supreme Court indicated that a state would be allowed to order the payment of spousal support or child support out of military retired pay. *McCarty,* at 230. In addition, a state court continued to be able to consider the effect of military retired pay on the economic circumstances of the parties when making an equitable division of their property. *In re Marriage of Dessauer,* 97 Wn. 2d 831, 839, 650 P. 2d 1099 (1982). The trial court had subject matter jurisdiction over Mr. Konzen's military retired pay and later changes in federal law did not affect that jurisdiction.

The Uniform Services Former Spouses' Protection Act (USFSPA) now allows state law to control the division of military retired pay as part of a property settlement in a dissolution. 10 U.S.C. § 1408(c) (1982). Congress intended that the USFSPA apply retroactively to eliminate all effects of the *McCarty* decision. 10 U.S.C.A.

§ 1408(c) (1); S.Rep. No. 502, 97th Cong., 2d Sess. 15, reprinted in 1982 U.S. Code Cong. & Ad. News 1596, 1611. In keeping with this intent, we review the award of Mr. Konzen's military retired pay in light of the requirements of the act. *In re Marriage of Smith,* 100 Wn. 2d 319, 669 P. 2d 448 (1983).

Petitioner next argues that the award was improper under the USFSPA. He interprets the USFSPA to allow state courts to award a portion of military retired pay as part of a property division only if the parties' marriage has lasted for more than ten years during the service member's military career. In dicta, this court has referred to such a limitation in the USFSPA. *In re Marriage of Smith,* at 323. *See also In re Marriage of Wood,* 34 Wn. App. 892, 893, 664 P. 2d 1297 (1983).

However, this issue is raised directly for the first time in this case. In *In re Marriage of Smith,* the parties had been married for almost 20 years, most of which were during the husband's military career. The Konzens were married for slightly more than ten years, but were not married during any part of Mr. Konzen's service in the Navy.

Petitioner relies on language in § 1408(d) (2) of the USFSPA which states:

> If the spouse or former spouse to whom payments are to be made under this section was not married to the member for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retired or retainer pay, payments may not be made under this section to the extent that they include an amount resulting from the treatment by the

> court under subsection (c) of disposable retired or retainer pay of the member as property of the member or property of the member and his spouse.

However, it is not clear from the structure of the statute whether this ten year requirement applies to every division of property authorized under § 1408(c) or only to direct payments by the government to a former spouse authorized under § 1408(d). When the language of a statute is ambiguous, this court will look to the legislative history to determine Congress' intent. *Bellevue Fire Fighters Local 1604 v. Bellevue,* 100 Wn. 2d 748, 675 P. 2d 592 (1984).

The legislative history clearly indicates that Congress did not intend to limit the application of the USFSPA to marriages lasting over ten years during the service member's military career.

The Department of Defense had urged the Senate to adopt such a 15-year requirement, but this recommendation was rejected in committee. S.R. No. 502, 97th Cong., 2d Sess. 9-10, reprinted in 1982 U.S. Code Cong. & Admin. News 1596, 1604-1605. The USFSPA as originally passed by the House had been amended to limit its application to marriages lasting more than ten years. 128 Cong. Rec. H 4726, H 4736 (daily ed. July 28, 1982) (Nichols amendment). Section 1408(c) (1) of the original House version stated:

> Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning on or after June 26, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such

> court if the spouse was married to the member for a period of not less than 10 years during which the member performed at least 10 years of service which is creditable in determining the member's eligibility for retired or retainer pay, or equivalent pay, as a result of his service in any of the uniformed services.

128 Cong. Rec. H 4726.

The language in § 1408(c) limiting the application of the USFSPA to marriages lasting more than ten years during the service member's military career was deleted in the conference committee. H. Rep. No. 749, 97th Cong., 2d Sess. 166-67, reprinted in 1982 U.S. Code Cong. & Admin. News 1570, 1572. The conference report states:

> The conferees agreed to remove the restriction that would require 10 years of marriage before military retired pay could be considered property by the courts. The conferees further agreed, however, that direct payments by the service finance centers to a former spouse from the member's retired pay based on a division of that retired pay as property would be limited to situations in which the former spouse was married to the member for at least 10 years while the member performed military service. The 10-year restriction would not apply to direct payments based on the award of child support or alimony.
>
> Currently, there is no Federal enforcement mechanism for court-ordered property division of military retired pay available to former spouses of military personnel. The conferees agreed to a Federal enforcement provision as described above; however, jurisdiction of the courts to consider military retired pay when fixing the property rights between the parties to a divorce, dissolution, legal separation or annulment would not be affected by the 10-year marriage requirement.

As passed, § 1408(c) (1) of the USFSPA states:

> Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

This interpretation of the USFSPA is in accord with rulings in other jurisdictions. A number of courts have made reference to a ten year requirement in the USFSPA. However, in each of these cases the marriage under consideration had lasted for more than ten years during the service member's military career and the issue was not squarely before the courts. *In re Marriage of Smith,* at 320; *Coates v. Coates,* 650 S.W. 2d 307, 311 (Mo. Ct. App. 1983); *In re Marriage of Costo,* 156 Cal. App. 3d 781, 203 Cal. Rptr. 85, 89 (1984). Every court which has directly considered this issue has determined that a state court's authority to divide military retired pay is not limited to cases in which the marriage has lasted for more than ten years during the service member's military career. *In re Marriage of Wood,* 66 Or. App. 941, 676 P. 2d 338, 340-41 (1984); *Oxelgren v. Oxelgren,* 670 S.W. 2d 411, 412 (Tex. Civ. App. 1984). *See also* Horkovich, *"Uniformed Services Former Spouses Protection Act: Congress' Answer to McCarty v. McCarty Goes Beyond the Fundamental Question,"* 23 A.F. 287, 307 (1982-83). We likewise so hold.

The final issue raised by petitioner is whether the trial court abused its discretion in awarding a portion of petitioner's separate property, 30 percent of his military retired pay, to his former spouse. Petitioner relies on

Bodine v. Bodine, 34 Wn. 2d 33, 35, 207 P. 2d 1213 (1949), in which the court stated that the situations which warrant an award of one spouse's separate property to the other spouse are "exceptional." At the time *Bodine* was decided the statute governing the division of property in a divorce stated:

> In granting a divorce, the court shall also make such disposition of the *property of the parties* as shall appear just and equitable, having regard to the respective merits of the parties, and to the conditions in which they will be left by such divorce, and to the party through whom the property was acquired, and to the burdens imposed upon it for the benefit of the children, and shall make provision for the guardianship, custody, and support and education of the minor children of such marriage.

Rem. Rev. Stat. § 989. While both separate and community property have always been considered to be before the court in a dissolution action, it was not until the statute was revised in 1949 that the allocation of separate property was explicitly governed by statutory criteria. Laws of 1949, ch. 215, § 11, p. 698. Prior to this change the courts were free to weigh the character of the property more heavily than other factors when allocating separate property.

However the current statute specifically applies the statutory criteria to separate property. RCW 26.09.080 states:

> In a proceeding for dissolution of the marriage . . . the court shall, without regard to marital misconduct, make such disposition of the property and the liabilities of the parties, *either community or separate,* as shall appear just and equitable after considering all relevant factors including, but not limited to:

> (1) The nature and extent of the community property;
>
> (2) The nature and extent of the separate property;
>
> (3) The duration of the marriage; and
>
> (4) The economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse having custody of any children.

(Italics ours.) This court will not single out a particular factor, such as the character of the property, and require as a matter of law that it be given greater weight than other relevant factors. The statute directs the trial court to weigh all of the factors, within the context of the particular circumstances of the parties, to come to a fair, just and equitable division of property. The character of the property is a relevant factor which must be considered, but is not controlling. *In re Marriage of Hadley*, 88 Wn. 2d 649, 656, 565 P. 2d 790 (1977). The decision of the trial court will not be disturbed on appeal absent a manifest abuse of discretion. *In re Marriage of Miracle*, 101 Wn. 2d 137, 139, 675 P. 2d 1229 (1984). Under the circumstances of this case, we find no abuse of discretion.

Respondent's request for attorney's fees is denied. RCW 26.09.140 allows a court to award attorney's fees if a party demonstrates financial need. Respondent has made no present showing of financial need, and petitioner's

claim was not frivolous. We affirm the trial court award as modified by the Court of Appeals.

/s/ Dimmick, J.

We concur:

/s/ Williams, C.J.
/s/ Utter, J.
/s/ Pearson, J.
/s/ Dore, J.
/s/ Andersen, J.

No. 50402-4

BRACHTENBACH, J. (Dissent) — The majority holds that a state court's authority to divide military retired pay is not limited to cases in which the marriage has lasted for more than 10 years during the service member's military career. Although policy considerations may favor this holding, it requires an interpretation of the applicable statute which totally disregards the rules of statutory construction established by this court. Discretionary application of the rules of statutory construction destroys their value and leads to unnecessary judicial tampering. For this reason I dissent.

Petitioner contends that the award of his military retired pay was improper under the Uniformed Services Former Spouses' Protection Act (USFSPA). He interprets the USFSPA to allow state courts to award a portion of military retired pay as part of a property division only if the parties' marriage has lasted for more than 10 years during the service member's military career.

Petitioner relies on language in 10 U.S.C.A. § 1408(d)(2) (West 1983) of the USFSPA which provides:

> If the spouse or former spouse to whom payments are to be made *under this section* was not married to the member for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retired or retainer pay, payments may not be made *under this section* to the extent that they include an amount resulting from the treatment by the court under subsection (c) of disposable retired or retainer pay of the member as property of the member or property of the member and his spouse.

(Italics mine.) Petitioner contends that the 10-year requirement of subsection (d) (2) is made applicable to the entire section 1408 by the language "under this section". Therefore, he argues no division is proper under section 1408 unless the couple was married during at least 10 years of service.

The majority summarily concludes that an ambiguity exists as to whether section 1408(d)(2) applies to subsection (d) alone or to the entire section 1408. In this way the majority introduces the legislative history which becomes the basis for its analysis. The majority does not identify or discuss the ambiguity in subsection (d). Indeed, it cannot, because no ambiguity exists.

The intent of the Legislature must be determined primarily from the language of the statute itself, and where the language is plain and free from ambiguity, there is no room for construction, because the meaning will be discovered from the wording of the statute itself. *Ford Motor Credit Co. v. Cenance,* 452 U.S. 155, 68 L. Ed. 2d 744, 101 S. Ct. 2239 (1981), on remand sub nom. *Ce-*

nance v. Bohn Ford, Inc., 666 F. 2d 97 (5th Cir. 1981); *People's Org. for Washington Energy Resources v. Utilities & Trans. Comm'n*, 101 Wn. 2d 425, 679 P. 2d 922 (1984); *Bellevue Fire Fighters Local 1604 v. Bellevue*, 100 Wn. 2d 748, 675 P. 2d 592 (1984). Accordingly, when a term used in a statute is not defined therein, it should be given its ordinary meaning. *State ex rel. Graham v. Northshore Sch. Dist. 417*, 99 Wn. 2d 232, 662 P. 2d 38 (1983). This is so even if the court, as draftsman might have used or preferred a different choice of language than that employed by the Legislature. *Guinness v. State*, 40 Wn. 2d 677, 246 P. 2d 433 (1952).

In the present case, the language of subsection (d), paragraph (2) is plain and free from ambiguity. The 10-year requirement set forth here is clearly made applicable to the entire section 1408 by the language "under this section". The majority's assertion that it could apply either to the entire section 1408 or only to *subsection* (d) is simply not supportable under this language. "Section" is defined as a distinct part or portion of a writing as a subdivision of a chapter. Webster's Third New International Dictionary 2052 (1961). Section 1408 is within chapter 71 and is a subdivision of this chapter. Subsection (d) is a further division of section 1408; subsection (d) is not properly termed a "section".

An examination of the statute itself is conclusive proof that the word "section" encompasses every part of section 1408(a) through (h). The introductory language states:

> Sec. 1002. (a) Chapter 71 of title 10, United States Code, is amended by adding at the end thereof the following new section:

96 Stat. 730, Pub. L. No. 97-252 (1982). Thereafter there follows in quotation marks all of section 1408(a) through (h). In other words, the introductory language itself defines "section" by stating that there is added a new *section.* What is contained within that *section* is indicated by the quotation marks in front of "§ 1408" through the last word in (h). The entire section 1408 is the new *section.* Because the phrase "under this *section*" can only apply to the entire section 1408, no ambiguity exists and therefore statutory construction is improper.

The Legislature's use of the words "section" and "subsection" in the entirety of section 1408 supports the contention that the 10-year requirement of subsection (d)(2) applies to the entire section 1408. When construing a statute, courts must read the act as a whole and not piecemeal. *State v. Parker,* 97 Wn. 2d 737, 649 P. 2d 637 (1982); *Burlington Northern, Inc. v. Johnston,* 89 Wn. 2d 321, 572 P. 2d 1085 (1977). Throughout section 1408 the Legislature used the term "section" to refer to the entire act. For example, the codification index of Chapter 71 of Title 10 lists the sections of the chapter. Section 1408 is listed under the heading "sections". We can therefore presume they knew to what that term correctly referred.

In addition, specific subsections are referred to. In section 1408(b)(1)(A) and in section 1408(f)(1) and (2) the term "subsection" is used to refer to subsection (h). In section 1408(d)(2) itself subsection (c) is referred to. In section 1408(d)(5) the division of paragraph is referred to, supporting further distinction between sections, subsections, and paragraphs. And most importantly, the subsection in question, subsection (d), is correctly referred to as "subsection" in section 1408(e)(1). It is

obvious that the Legislature knew the difference between "section" and "subsection" and had they wanted to limit the 10-year requirement to subsection (d) they would have used the proper term.

If the majority is correct in its conclusion that the limitation in section 1408(d)(2) is limited only to direct payments made under section 1408(d)(1), then the whole act is rendered a shambles. For example, section 1408 (a) (1) through (6) provides the definitions of the words "court", "court order", "final decree", "disposable retired or retainer pay", "member" and "spouse or former spouse". Under the majority's analysis these terms would apply *only* to section 1408(a). Thus, the definitions therein provided would stand alone and section 1408(a) would be meaningless. Likewise, section 1408(b) which determines when service of a court order is effective and when it is regular on its face would apply only to itself and would stand as a meaningless collection of words, applicable to nothing.

In addition, section 1408(h) is utterly meaningless under the majority's analysis. In its entirety it provides: "[t]he Secretaries concerned shall prescribe uniform regulations for the administration of this section." The majority's holding would limit such regulations to the administration of section 1408(h) which only authorizes the issuances of regulations.

Obviously, each subsection cannot refer solely to itself. The language "under this section" must refer to the entire section 1408 or the act is rendered useless. For example, the trial court disposed of the military pension by court order. The court order must fulfill the require-

ments of subsection (a)(2) before the military retired payments may be divided. The court order in this case is the very type of order section 1408 is designed to deal with. Then subsection (c) comes into play by announcing that such division is possible. And finally subsection (d) limits the division in various ways. The subsections are meant to work together and each is designed to apply to the entire section 1408.

It may well be that the conference report, cited by the majority, is what the members of the conference committee intended. However, that is not what the drafter of the bill itself put into the document ultimately passed.

The interpretation which applies the 10-year requirement of subsection (d)(2) to the entire statute is reconcilable with the intent apparent in the remainder of the statute. The idea that the Legislature wanted to limit state courts' authority to divide military retired pay to cases where the marriages lasted a reasonable period of time fits into the general scheme of offering some protection to the retiring spouse. Section 1408(c)(3) similarly protects this spouse by not giving courts the authority to order the service member spouse to retire or apply for retirement so as to effectuate payment under section 1408. Subsection (d) provides for various limitations which protect the retiring spouse to an extent. Subsection (d), paragraph (1) requires a court order before benefits can be paid directly to the spouse or former spouse. Subsection (d), paragraph (3) provides that a court may not order payments to be made more often than once each month. Any payment, direct or other, would occur most beneficially for both spouses at a time when money was available, after the government's

monthly payment. Subsection (d), paragraph (4) limits payment under section 1408 to the time when the retired or retiring spouse is still alive. Subsection (d), paragraph (5) sets forth the procedure for garnishment of the military retired pay. Each of these paragraphs of subsection (d) refer to the "section" and each is reconcilable to the interpretation that they limit the entire section 1408. Contrary to the holding in *In re Marriage of Wood,* 66 Or. App. 941, 676 P. 2d 338 (1984), the limitation in (d)(1), requiring a court order before benefits are paid directly to the spouse or former spouse, is not necessarily applicable to the entire subsection (d). Each of the paragraphs are separate limitations on section 1408.

Because there is no ambiguity in subsection (d) and the ordinary meaning applied to the questioned term is reconcilable with the remainder of the statute, I would hold that the 10-year requirement of subsection (d)(2) applies to the entire act. Therefore, I would reverse and remand.

/s/ Brachtenbach, J.
/s/ Dolliver, J., concurs.

APPENDIX C

THE SUPREME COURT OF WASHINGTON

No. 50402-4

In the Matter of the Marriage of JOSEPH J. KONZEN,

Petitioner,

and

GERALDINE H. KONZEN,

Respondent.

ORDER DENYING
MOTION FOR RECONSIDERATION

(Filed February 15, 1985)

The Court having unanimously decided that the respondent's motion for reconsideration should be denied,

It is ordered that the motion be and it hereby is denied.

Dated this 15th day of February, 1985.

/s/ James Dolliver, Chief Justice

APPENDIX D

§ 1408. Payment of retired or retainer pay in compliance with court orders

(a) In this section:

(1) "Court" means—

(A) any court of competent jurisdiction of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands;

(B) any court of the United States (as defined in section 451 of title 28) having competent jurisdiction; and

(C) any court of competent jurisdiction of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country.

(2) "Court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree), which—

(A) is issued in accordance with the laws of the jurisdiction of that court;

(B) provides for—

(i) payment of child support (as defined in section 462(b) of the Social Security Act (42 U.S.C. 662(b)));

(ii) payment of alimony (as defined in section 462(c) of the Social Security Act (42 U.S.C. 662(c))); or

(iii) division of property (including a division of community property); and

(C) specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired or retainer pay, from the disposable retired or retainer pay of a member to the spouse or former spouse of that member.

(3) "Final decree" means a decree which no appeal may be taken or from which no appeal has been taken within the time allowed for taking such appeals under the laws applicable to such appeals, or a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals.

(4) "Disposable retired or retainer pay" means the total monthly retired or retainer pay to which a member is entitled (other than the retired pay of a member retired for disability under chapter 61 of this title) less amounts which—

(A) are owed by that member to the United States;

(B) are required by law to be and are deducted from the retired or retainer pay of such member, including fines and forfeitures ordered by courts-martial, Federal employment taxes, and amounts waived in order to receive compensation under title 5 or title 38;

(C) are properly withheld for Federal, State, or local income tax purposes, if the withholding of such amounts is authorized or required by law and to the extent such amounts withheld are not greater than would be authorized if such member claimed all dependents to which he was entitled.

(D) are withheld under section 3402(i) of the Internal Revenue Code of 1954 (26 U.S.C. 3402(i) if such member presents evidence of a tax obligation which supports such withholding.

(E) are deducted as Government life insurance premiums (not including amounts deducted for supplemental coverage); or

(F) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired or retainer pay is being made pursuant to a court order under this section.

(5) "Member" includes a former member.

(6) "Spouse or former spouse" means the husband or wife, or former husband or wife, respectively, of a member who, on or before the date of a court order, was married to that member.

(b) For the purposes of this section—

(1) service of a court order is effective if—

(A) an appropriate agent of the Secretary concerned designated for receipt of service of court orders under regulations prescribed pursuant to subsection (h) or, if no agent has been so designated, the Secretary concerned, is personally served or is served by certified or registered mail, return receipt requested;

(B) the court order is regular on its face;

(C) the court order or other documents served with the court order identify the member concerned and include the social security number of such member; and

(D) the court order or other documents served with the court order certify that the rights of the member under the Soldiers' and Sailors'

Civil Relief Act of 1940 (50 U.S.C.App. 501 et seq.) were observed; and

(2) a court order is regular on its face if the order—

(A) is issued by a court of competent jurisdiction;

(B) is legal in form; and

(C) includes nothing on its face that provides reasonable notice that it is issued without authority of law.

(c)(1) Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

(2) Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse.

(3) This section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section.

(4) A court may not treat the disposable retired or retainer pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his demicile in the territorial juris-

diction of the court, or (C) his consent to the jurisdiction of the court.

(d) (1) After effective service on the Secretary concerned of a court order with respect to the payment of a portion of the retired or retainer pay of a member to the spouse or a former spouse of the member, the Secretary shall, subject to the limitations of this section, make payments to the spouse or former spouse in the amount of the disposable retired or retainer pay of the member specifically provided for in the court order. In the case of a member entitled to receive retired or retainer pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date of effective service. In the case of a member not entitled to receive retired or retainer pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date on which the member first becomes entitled to receive retired or retainer pay.

(2) If the spouse or former spouse to whom payments are to be made under this section was not married to the member for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retired or retainer pay, payments may not be made under this section to the extent that they include an amount resulting from the treatment by the court under subsection (c) of disposable retired or retainer pay of the member as property of the member or property of the member and his spouse.

(3) Payments under this section shall not be made more frequently than once each month, and the Secretary

concerned shall not be required to vary normal pay and disbursement cycles for retired or retainer pay in order to comply with a court order.

(4) Payments from the disposable retired or retainer pay of a member pursuant to this section shall terminate in accordance with the terms of the applicable court order, but not later than the date of the death of the member or the date of the death of the spouse or former spouse to whom payments are being made, whichever occurs first.

(5) If a court order described in paragraph (1) provides for a division of property (including a division of community property) in addition to an amount of disposable retired or retainer pay, the Secretary concerned shall, subject to the limitations of this section, pay to the spouse or former spouse of the member, from the disposable retired or retainer pay of the member, any part of the amount payable to the spouse or former spouse under the division of property upon effective service of a final court order of garnishment of such amount from such retired or retainer pay.

(e)(1) The total amount of the disposable retired or retainer pay of a member payable under subsection (d) may not exceed 50 percent of such disposable retired or retainer pay.

(2) In the event of effective service of more than one court order which provide for payment to a spouse and one or more former spouses or to more than one former spouse from the disposable retired or retainer pay of a member, such pay shall be used to satisfy (subject to the limitations of paragraph (1)) such court orders on a

first-come, first-served basis. Such court orders shall be satisfied (subject to the limitations of paragraph (1)) out of that amount of disposable retired or retainer pay which remains after the satisfaction of all court orders which have been previously served.

(3)(A) In the event of effective service of conflicting court orders under this section which assert to direct that different amounts be paid during a month to the same spouse or former spouse from the disposable retired or retainer pay of the same member, the Secretary concerned shall—

(i) pay to that spouse the least amount of disposable retired or retainer pay directed to be paid during that month by any such conflicting court order, but not more than the amount of disposable retired or retainer pay which remains available for payment of such court orders based on when such court orders were effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4).

(ii) retain an amount of disposable retired or retainer pay that is equal to the lesser of—

(I) the difference between the largest amount of retired or retainer pay required by any conflicting court order to be paid to the spouse or former spouse and the amount payable to the spouse or former spouse under clause (i); and

(II) the amount of disposable retired or retainer pay which remains available for payment of any conflicting court order based on when such court order was effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4); and

(iii) pay to that member the amount which is equal to the amount of that member's disposable re-

tired or retainer pay (less any amount paid during such month pursuant to legal process served under section 459 of the Social Security Act (42 U.S.C. 659) and any amount paid during such month pursuant to court orders effectively served under this section, other than such conflicting court orders) minus—

(I) the amount of disposable retired or retaine pay paid unde clause (i); and

(II) the amount of disposable retired or retainer pay retained under clause (ii).

(B) The Secretary concerned shall hold the amount retained under clause (ii) of subparagraph (a) until such time as that Secretary is provided with a court order which has been certified by the member and the spouse or former spouse to be valid and applicable to the retained amount. Upon being provided with such an order, the Secretary shall pay the retained amount in accordance with the order.

(4)(A) In the event of effective service of a court order under this section and the service of legal process pursuant to section 459 of the Social Security Act (42 U.S.C. 659), both of which provide for payments during a month from the retired or retainer pay of the same member, such court orders and legal process shall be satisfied on a first-come, fist-serve basis. Such court orders and legal process shall be satisfied out of moneys which are subject to such orders and legal process and which remain available in accordance with the limitations of paragraph (1) and subparagraph (B) of this paragraph during such month after the satisfaction of all court orders or legal process which have been previously served.

(B) Notwithstanding any other provision of law, the total amount of the disposable retired or retainer pay of

a member payable by the Secretary concerned under all court orders pursuant to this section and all legal processes pursuant to section 459 of the Social Security Act (42 U.S.C. 659) with respect to a member may not exceed 65 percent of the disposable retired or retainer pay payable to such member.

(5) A court order which itself or because of previously served court orders provides for the payment of an amount of disposable retired or retainer pay which exceeds the amount of such pay available for payment because of the limit set forth in paragraph (1), or which, because of previously served court orders or legal process previously served under section 459 of the Social Security Act (42 U.S.C. 659), provides for payment of an amount of disposable retired or retainer pay that exceeds the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4), shall not be considered to be irregular on its face solely for that reason. However, such order shall be considered to be fully satisfied for purposes of this section by the payment to the spouse or former spouse of the maximum amount of disposable retired or retainer pay permitted under paragraph (1) and subparagraph (B) of paragraph (4).

(6) Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired or retainer pay under this section have been made in the maximum amount permitted under paragraph(1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided

under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.

(f)(1) The United States and any officer or employee of the United States shall not be liable with respect to any payment made from retired or retainer pay to any member, spouse, or former spouse pursuant to a court order that is regular on its face if such payment is made in accordance with this section and the regulations prescribed pursuant to subsection (h).

(2) An officer or employee of the United States who, under regulations prescribed pursuant to subsection (h), has the duty to respond to interrogatories shall not be subject under any law to any disciplinary action or civil or criminal liability or penalty for, or because of, any disclosure of information made by him in carrying out any of his duties which directly or indirectly pertain to answering such interrogatories.

(g) A person receiving effective service of a court order under this section shall, as soon as possible, but not later than 30 days after the date on which effective service is made, send a written notice of such court order (together with a copy of such order) to the member affected by the court order at his last known address.

(h) The Secretaries concerned shall prescribe uniform regulations for the administration of this section.

(Added Pub.L. 97-252, Title X, § 1002(a), Sept. 8, 1982, 96 Stat. 730.)

Supreme Court, U.S.
FILED
JUN 8 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1767

In The
Supreme Court of the United States
October Term, 1984

—o—

IN THE MATTER OF THE MARRIAGE OF
JOSEPH J. KONZEN,

Petitioner,

and

GERALDINE H. KONZEN,

Respondent.

—o—

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
to the
Supreme Court of the State of Washington

—o—

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RESPONSE TO QUESTIONS PRESENTED FOR REVIEW

ISSUE NO. I

The first issue should be phrased:

> Do the provisions of the Uniformed Services Former Spouses' Protection Act (USFSPA) contained in 10 U.S.C. § 1408 prohibit a state court, in a dissolution of marriage proceeding, from awarding a portion of a service member's military retirement pay to the member's spouse when the marriage of the parties was subsequent to the member's retirement from the military service?

ISSUE NO. II

The Petitioner has failed to show a conflict between the express terms of the Uniformed Services Former Spouses' Protection Act and the State of Washington's policy that all property of the parties in a dissolution of marriage proceeding is before the state courts and may be divided in a just and equitable manner between the parties. The Petitioner has failed to show how the State of Washington policy sufficiently injures any objective of Federal policy in the USFSPA.

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OTHER AUTHORITIES:

10 U.S.C. § 1408	3, 5
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No. 84-1767

In The
Supreme Court of the United States
October Term, 1984

IN THE MATTER OF THE MARRIAGE OF
JOSEPH J. KONZEN,

Petitioner,

and

GERALDINE H. KONZEN,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the Supreme Court of the State of Washington

GROUNDS FOR JURISDICTION

Petitioner has failed to give a concise statement of the ground on which the jurisdiction of this Court is invoked. Petitioner has not called the constitutionality of any statute into question and therefore the requirements of 28 U.S.C. § 1257 have not been met.

COUNTER STATEMENT OF THE CASE

The parties met and began a relationship in September, 1964, prior to the Petitioner's retirement in June, 1967 from the U. S. Navy. After continuing their relationship for nearly six (6) years, the parties were married on June 26, 1970.

The Respondent has not graduated from high school. She is a recovering alcoholic. She has worked occasionally as a waitress and a retail clerk.

The Petitioner holds an undergraduate degree and a master's degree. He also worked as a manager for a golf and country club until just prior to the trial in this case. The Petitioner has a substantially and disproportionately greater earning capacity than the Respondent. At the time of trial, Petitioner's net income was approximately $1,500.00 per month, while the Respondent was unemployed.

The parties had three major assets:

(1) The Petitioner's military pension which was found to have a present value of $167,870.00 with monthly payments of $1,409.37.

(2) A vendor's interest in the sales contract of a restaurant, with a balance due of $52,900.00 and payments of $600.00 per month.

(3) The family residence with a gross value of $119,100.00, and a mortgage obligation of $53,650.00, leaving a net equity of $65,450.00.

The trial court found that the Respondent had living expenses of $1,000.00 per month.

The trial court found that the military pension was the separate property of the Petitioner and that the other

assets were community property under the laws of the State of Washington. The trial court granted a decree of dissolution of the marriage and divided the community property by awarding $60,860.00 worth of assets to the Respondent and $76,399.00, including the equity in the family home, to the Petitioner.

Included as part of the assets awarded to the Respondent was the restaurant sales contract. This would bring her $600.00 per month. The court awarded her thirty percent (30%) of the Petitioner's military pension as an award of property in the nature of permanent, non-modifiable alimony so that she would have the liquid assets to meet her monthly living expenses. Since the time of trial, the vendor's contract has become in arrears, and the Respondent has been forced to bring suit on the note. One of the makers has since filed for bankruptcy.

In the dissolution of marriage, the Petitioner was awarded the family home and the remaining seventy percent (70%) of the pension. The pension had a present value at the time of trial of $117,509.00. The Petitioner thus received approximately $1,000.00 per month from the pension.

The Petitioner appealed to the Washington State Court of Appeals, arguing that the trial court had abused its discretion in dividing the property. During the pendency of that appeal, this court decided *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728 (1981). Congress then enacted the Uniformed Services Former Spouses' Protection Act [Public Law No. 97-252, § 101, et seq., 96 Stat. 730 (1982), Codified at 10 U.S.C. § 1408]. The effective date of the Act was February 1, 1983, the date that oral argument was held before the State Court of Appeals.

The State Court of Appeals affirmed the trial court's decision with the modification that payments to the Respondent/wife would end on her death and not become part of her estate if she died before the Petitioner. The Washington State Supreme Court affirmed.

ARGUMENT

I.

The Provisions Of The Uniformed Services Former Spouses' Protection Act Allow A State Court To Treat Military Retired Pay As Property And Dispose Of It In A Marriage Dissolution In Accordance With The State Law.

The Uniformed Services Former Spouses' Protection Act removes the Federal preemption that this Court had found to exist in *McCarty v. McCarty,* 453 U.S. 210, 101 S. Ct. 2728 (1981). The Act returns to the states the right to treat military retired pay as property in a dissolution action. The primary purpose of the Act was to remove the effect of *McCarty* and return the courts to the laws effective the day before *McCarty* was handed down.

Paragraph (c)(1) of the Act provides:

> Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

Spouse or former spouse is defined at (a)(6) as follows:

> Spouse or former spouse means the husband or wife, or former husband or wife, respectively, of a member who, on or before the date of a court order, was married to that member.

The Respondent is a spouse as defined in the Act. The limitations on the state court's treatment of retired pay as property are contained in (c)(2)-(4). These provide:

> (2) Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse.
>
> (3) This section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section.
>
> (4) A court may not treat the disposable retired or retainer pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court.

There is no restriction on the state courts' power to treat the retired pay as property as argued by Petitioner. There is no requirement that the parties be married ten (10) years during the member's years in the service. The ten (10) year provision only affects the enforcement mechanisms set up by Congress in §1408(d). This part of the act refers to payments by the government directly to the spouse or former spouse of the retired member upon service of a court order to that effect.

The distinction between the power of the state courts to treat the retired pay as property and the enforcement mechanisms set up under the Act for direct payments from the government is clear. The ten (10) year requirement only applies to the latter.

Petitioner argues for a different interpretation. The legislative history as quoted in the Washington State Court of Appeals decision and the Washington State Supreme Court decision shows the fallacy of Petitioner's argument. Congress intended to return the power to the states to treat military retired pay as property and divide it in accordance with the law of the appropriate jurisdiction. The result in this case from the State of Washington is consistent with the Act and congressional policy as set forth in the legislative history. Congress specifically considered whether there should be a five, ten or fifteen year requirement on the state courts' power, but decided against such a limitation. 1982 U.S. Code Cong. & Admin. News 1570, 1572.

The statute followed by the Washington courts in disposing of the property of the spouses is consistent with the considerations brought to the attention of Congress in their deliberations on this Act. RCW 26.09.080 provides:

> In a proceeding for dissolution of the marriage, legal separation, declaration of invalidity, or in a proceeding for disposition of property following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall, without regard to marital misconduct, make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equit-

able after considering all relevant factors including, but not limited to:

(1) The nature and extent of the community property;

(2) The nature and extent of the separate property;

(3) The duration of the marriage; and

(4) The economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse having custody of any children.

This statute was enacted in 1973 and was similar to the previous statute that had been in effect in Washington. It was in effect at the time that Congress passed the Uniformed Services Former Spouses' Protection Act.

Most state courts consider the same factors as are considered under Washington State law. As stated in the legislative history, found in 1982 U.S. Code Cong. & Admin. News at page 1605:

> These factors afford the domestic courts and the parties involved the opportunity to assess all the unique circumstances in each case without undue limitation. The duration of marriage should only be one of a number of factors applied in deciding any entitlement to a property interest in retired pay; it should not necessarily be the determining one. The committee believes that the function of weighing all these factors in effecting equitable distribution of marital assets is best preserved for the expertise of the courts involved.

The federal Act does not preclude the State of Washington from dividing the separate military pension of the Petitioner.

II.

The USFSPA Allows State Courts To Treat Military Retired Pay As Property And Reverses The McCarty Holding That Military Retired Pay Is A Personal Entitlement Of The Retired Service Member.

The Uniformed Services Former Spouses' Protection Act was designed to restore the law to what it was prior to this court's decision in *McCarty,* supra. The Act authorizes the state courts to once again treat retired pay as property in accordance with the law of the jurisdiction involved.

Since the Act in this instance was made retroactive to the day before the *McCarty* decision, state courts are allowed to once again apply the laws that were in existence on that date. The U. S. Supreme Court's holding in *McCarty* that military retired pay was a personal entitlement to the retired service member is no longer in effect.

Prior to *McCarty,* Washington courts treated military pay as property. *Wilder v. Wilder,* 85 Wn.2d 364; 534 P.2d 1355 (1975). This once again is allowed under the Act.

Even while the *McCarty* decision retained some vitality, state courts still had subject matter jurisdiction over the military retired pay. *McCarty,* 453 U.S. 210 at 230. An award of maintenance or alimony from the military retired pay would have been permissible under *McCarty.*

Petitioner has failed to satisfy the tests for federal preemption laid down by this Court in *Hisquierdo v. Hisquierdo,* 439 U.S. 572 at 581, 99 S.Ct. 802 (1979). This Court stated in *Hisquierdo*:

On the rare occasion when state family law has come into conflict with the federal statute, this court has limited review under the supremacy clause to a determination whether Congress has "positively required by direct enactment" that state law be preempted. (Case citation omitted) A mere conflict in words is not sufficient. State family and family-property law must do "major damage" to "clear and substantial" federal interests before the supremacy clause will demand that state law be overridden. (Case citation omitted).

Further, this Court held at p. 583:

The approach must be practical. The federal nature of the benefits does not by itself proscribe the entire field of state control . . . The pertinent questions are whether the right as asserted conflicts with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal program to require nonrecognition.

———o———

CONCLUSION

The Washington State Supreme Court decision is not in conflict with Federal law, but is consistent with the Uniformed Services Former Spouses' Protection Act.

The United States Supreme Court should either affirm the Washington Supreme Court decision on its merits or deny the petition for a writ of certiorari.

Respectfully submitted,

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